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IN THE

Supreme Court of the United States

OCTOBER TERM 1992

THE 1975 SALARIED RETIREMENT PLAN
FOR ELIGIBLE EMPLOYEES
OF CRUCIBLE, INC., ET AL.,
Petitioners,

v.

DAVID A. NOBERS, ET AL.,
Respondents.

APPENDIX TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

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603

INDEX TO APPENDIX

PAGE

Opinion of the United States Court of Appeals for the Third Circuit in *The 1975 Salaried Retirement Plan for Eligible Employees of Crucible Inc., et al., v. David A. Nobers, et al.*, No. 91-3426, (July 6, 1992) 1a

Order of the United States District Court for the Western District of Pennsylvania in *The 1975 Salaried Retirement Plan for Eligible Employees of Crucible Inc., et al., v. David A. Nobers, et al.*, No. 90-80, (June 26, 1991) 23a

Order of the United States District Court for the Western District of Pennsylvania in *The 1975 Salaried Retirement Plan for Eligible Employees of Crucible Inc., et al., v. David A. Nobers, et al.*, No. 90-80, (May 30, 1991) 24a

Order and Findings of Fact and Conclusions of Law of the United States District Court for the Western District of Pennsylvania in *David A. Nobers, et al., v. Crucible Inc., et al.*, C.A. No. 82-1846, (December 10, 1982) (Nobers I) (Transcript of Hearing on Motion to Dismiss, pp. 31-48) 26a

Order and Opinion of the Superior Court of Pennsylvania in *David A. Nobers, et al., v. Crucible Inc., et al.*, No. 1251 Pittsburgh 1987, (July 25, 1988) (Nobers II) 41a

Order and Opinion of the Court of Common Pleas for the County of Beaver, Pennsylvania in *David A. Nobers, et al., v. Crucible Inc., et al.*, No. 843 of 1984, (August 7, 1987) (Nobers II) 52a

Filed July 6, 1992

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 91-3426

THE 1975 SALARIED RETIREMENT PLAN FOR ELIGIBLE EMPLOYEES OF CRUCIBLE, INC., an ERISA plan; THE COLT INDUSTRIES OPERATING CORPORATION SEVERANCE PLAN FOR SALARIED, NONUNION EMPLOYEES, an ERISA plan; THE RETIREMENT COMMITTEE OF COLTEC INDUSTRIES, INC., as administrator of The 1975 Salaried Retirement Plan for Eligible Employees of Crucible, Inc. and The Colt Industries Operating Corporation Severence Plan for Salaried, Nonunion Employees; THE PENSION PLAN FOR COLLECTIVELY BARGAINED EMPLOYEES OF MIDLAND OPERATIONS OF CRUCIBLE, INC., an ERISA plan; THE SUPPLEMENTAL UNEMPLOYMENT BENEFIT PLAN FOR COLLECTIVELY BARGAINED EMPLOYEES OF MIDLAND OPERATIONS OF CRUCIBLE, INC., an ERISA plan; THE SEVERANCE ALLOWANCE PLAN FOR THE COLLECTIVELY BARGAINED EMPLOYEES OF MIDLAND OPERATIONS OF CRUCIBLE, INC., an ERISA plan; and COLTEC INDUSTRIES, INC., as administrator of The Pension Plan for Collectively Bargained Employees of Midland Operations of Crucible, Inc., The Supplemental Unemployment Benefit Plan for Collectively Bargained Employees of

Midland Operations of Crucible, Inc., and The Severance Allowance Plan for the Collectively Bargained Employees of Midland Operations of Crucible, Inc.

Appellants

v.

DAVID A. NOBERS; ROBERT R. CAMPBELL, JR.; GASPER P. PORTO; and GARY T. WEEKLY

On Appeal from the United States District Court for the Western District of Pennsylvania (Dist. Ct. Civil No. 90-0080)

Argued December 13, 1991

Before: BECKER, GREENBERG, and ALITO, *Circuit Judges*

(Filed: July 6, 1992)

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OPINION OF THE COURT

BECKER, *Circuit Judge.*

This appeal requires us to construe the Anti-Injunction Act, 28 U.S.C. § 2283 (1988), in the context of the Employee Retirement and Income Security Act ("ERISA"), 29 U.S.C.A. §§ 1001-1462 (West 1985 & Supp. 1992). The plaintiff-appellants, five plans for the benefit of employees of Crucible, Inc., seek to enjoin the appellees, four employees whom Crucible laid off, from prosecuting a contract action against Crucible and its parent company, Colt Industries, Inc., in Pennsylvania state court. The district court for the Western District of Pennsylvania denied the requested injunction.

The plans allege that the state court suit will interfere with the performance of their duties under ERISA. Contending that the state court suit "relates to" ERISA plans because the state court will have to construe the plans in determining liability, the plans submit that, under sections 502(e)(1) and 514(a) of ERISA, 29 U.S.C. §§ 1132(e)(1), 1144(a) (1988), the state court action is preempted and the case is subject to exclusive federal jurisdiction.

Under the Anti-Injunction Act, a federal court may grant injunctions to stay state court proceedings only when "expressly authorized by an Act of Congress, or where necessary in aid of its jurisdiction, or to protect or effectuate its judgments." 28 U.S.C. § 2283 (1988). The plans assert that their claim falls under all three

exceptions. They contend that section 502(a)(3) of ERISA, 29 U.S.C. § 1132(a)(3), "expressly authorize[s]" injunctions for violations of ERISA, including violations of its supersedure provisions. They also argue that an injunction is necessary in aid of the federal court's (exclusive) jurisdiction, and to protect the district court's judgment in favor of Crucible and Colt in an earlier suit by the employees.

Although we agree with the plans that the state court suit is preempted and that the claim, if brought under ERISA, would be subject to exclusive federal jurisdiction, we conclude that the plans' request falls under none of the three exceptions in the Anti-Injunction Act. We will therefore affirm the judgment of the district court denying the injunction.

I. FACTS AND PROCEDURAL HISTORY

The appellees claim to represent a class of former employees of Crucible's Midland, Pennsylvania steel plant who were promoted from positions in Crucible's collective bargaining unit into salaried, non-union positions. Around 1980, Crucible began to have economic troubles and instituted cutbacks and layoffs. During this period, some salaried employees were demoted back to union positions, but the putative class members were not demoted, and were eventually laid off in 1982 as salaried employees. The appellees contend that they had a contractual right to be demoted from managerial and supervisory positions back to the bargaining unit and that if they had been properly demoted, they would have received substantially greater pension and related benefits than those to which they are entitled as salaried

employees. Protracted litigation has followed their layoff.

The appellees first brought Civil Action No. 82-1846 in the district court for the Western District of Pennsylvania against Crucible, Colt, the steelworkers' union, and the administrator of the union's pension plans. The appellees claimed that the collective bargaining agreement required Crucible to demote them and lay them off as union employees rather than as salaried employees, and that the union breached its duty of fair representation by failing to file their grievance. This suit ("*Nobers I*") was a hybrid class action based on section 301 of the Labor-Management Relations Act ("LMRA"), 29 U.S.C. § 185 (1988). The district court certified the class pursuant to Federal Rule of Civil Procedure ("FRCP") 23, but granted summary judgment against the appellees (plaintiffs there) on the ground that they had neither an express nor an implied right under the collective bargaining agreement to be terminated as union employees.[1] This court affirmed without opinion. *Nobers I*, 722 F.2d 733 (3d Cir. 1983).

Not fazed by their loss in federal court, in 1984 the appellees brought Action No. 843-1984 in the Court of Common Pleas of Beaver County, Pennsylvania. This class action suit ("*Nobers II*"), which is still pending, asserts claims against Crucible and Colt for breach of and interference with alleged express and implied contracts of employment. The appellees allege a right to return

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1. The court also granted summary judgment on the plaintiffs' claim of general "violations and breaches of plaintiffs' rights." The court dismissed their ERISA claims for failure to join the proper defendants and to exhaust administrative remedies.

to the bargaining unit and to be terminated as union employees rather than as salaried employees. They seek damages equivalent to the unemployment, pension, and insurance benefits available to bargaining unit employees.

Crucible and Colt attempted to remove *Nobers II* to federal district court, but the district court remanded the case to state court on the grounds that neither diversity jurisdiction nor ancillary jurisdiction supported original federal jurisdiction. *Nobers v. Crucible, Inc.*, 602 F. Supp. 703 (W.D. Pa. 1985). After remand, Colt and Crucible took another tack to prevent the state court from acting on *Nobers II*: they brought Civil Action No. 85-563 in federal court, seeking to enjoin *Nobers II* on the ground that it was barred by the res judicata effect of *Nobers I*. The district court denied relief on the ground that the face of the *Nobers II* complaint made no strong and unequivocal showing of relitigation, as required by the case law under the Anti-Injunction Act, 28 U.S.C. § 2283. This court affirmed without opinion. *Colt Industries v. Nobers*, 787 F.2d 581 (3d Cir. 1986).

The Beaver County Court of Common Pleas resumed its proceedings in *Nobers II*, and in 1987 dismissed the action upon the motion of Colt and Crucible, holding that ERISA preempted the appellees' state law claims. On appeal, however, the Pennsylvania Superior Court reversed, *Nobers v. Crucible, Inc.*, 376 Pa. Super. 156, 545 A.2d 367 (1988), basing its ruling on *Shaw v. Westinghouse Electric Corp.*, 276 Pa. Super. 220, 419 A.2d 175 (1980), and finding the association between the *Nobers II* contractual allegations and the ERISA plans to be "tangential at best," 545 A.2d at 371.

The Pennsylvania Supreme Court denied review. 522 Pa. 578, 559 A.2d 39 (1989).

After the Pennsylvania Supreme Court ruling, Colt and Crucible returned to federal district court, seeking to remove *Nobers II* based on intervening United States Supreme Court decisions about the scope of ERISA preemption. The district court ruled, however, that this second attempt at removal was untimely. Colt and Crucible petitioned for mandamus from this court, but we denied the petition. *Crucible Inc. v. Zeigler*, No. 90-3049 (3d Cir. June 8, 1990). *Nobers II* is therefore still pending in state trial court.

Finally, the Crucible employee benefit *plans* (but not Crucible and Colt themselves) brought this action in federal district court under ERISA § 502(a)(3), 29 U.S.C. § 1132(a)(3), seeking declaratory guidance as to their obligations to the appellees. The district court had jurisdiction under ERISA § 502(e)(1), 29 U.S.C. § 1132(e)(1). In addition to a declaratory judgment, the plans seek to enjoin the defendant-appellees here (the plaintiffs in *Nobers II*) from further prosecuting *Nobers II* in state court. On May 30, 1991, the district court denied injunctive relief, but allowed discovery to proceed on the plans' requests for declaratory relief.

To ensure immediate appealability of the denial of injunctive relief, the plans requested that the district court enter a final judgment under FRCP 54(b) on that claim. On June 26, 1991, the district court did so. We therefore have jurisdiction over the plans' appeal under 28 U.S.C. § 1291. Our review is plenary. *Carey v. Pennsylvania Enterprises*, 876 F.2d 333, 337 (3d Cir. 1987).

II. AVAILABILITY OF AN INJUNCTION UNDER THE ANTI-INJUNCTION ACT

The plans request that we reverse the district court's judgment refusing to enjoin the appellees from prosecuting *Nobers II* in Pennsylvania court. Under the Anti-Injunction Act,

> [a] court of the United States may not grant an injunction to stay proceedings in a State court except [1] as expressly authorized by Act of Congress, or [2] where necessary in aid of its jurisdiction, or [3] to protect or effectuate its judgments.

28 U.S.C. § 2283. Although technically the plans seek only to enjoin the appellees and not the state court proceeding itself, the Anti-Injunction Act cannot be evaded by such a formality. See, for example, *Atlantic Coast Line Railroad v. Brotherhood of Locomotive Engineers*, 398 U.S. 281, 287, 90 S. Ct. 1739, 1743 (1970). Moreover, the three exceptions in the Anti-Injunction Act are exclusive: an injunction against *Nobers II* is proper only if it falls within one of them. See, for example, *Choo v. Exxon Corp.*, 486 U.S. 140, 146, 108 S. Ct. 1684, 1689 (1988); *Amalgamated Clothing Workers of America v. Richman Brothers*, 348 U.S. 511, 514-16, 75 S. Ct. 452, 454-55 (1955). We take up the the exceptions in the order pressed by the plans.

A. *"Necessary in Aid of Its Jurisdiction"*

The plans contend that the subject matter of *Nobers II* is, under ERISA section 502(e)(1), 29 U.S.C. § 1132(e)(1), subject to exclusive federal jurisdiction, and therefore the requested injunction

falls under the second exception to the Anti-Injunction Act because it is necessary in aid of the district court's (exclusive) jurisdiction over claims of this sort. We must first determine whether federal courts have exclusive jurisdiction over the claims in *Nobers II*; if so, we must then determine whether, as the plans claim, that is sufficient to invoke the "necessary in aid of its jurisdiction" exception.

1. *Preemption and Exclusive Federal Jurisdiction*

The plans contend that *Nobers II*, although nominally a contract action against Colt and Crucible, "relates to," and implicates construction of, an ERISA plan. Section 514(a) of ERISA provides (with exceptions not relevant here) that subchapters II and III of ERISA (covering, among other things, jurisdiction, administration, enforcement, and plan termination insurance) "shall supersede any and all State laws insofar as they may now or hereafter relate to any [ERISA-covered] employee benefit plan . . . ." 29 U.S.C. § 1144(a) (1988). Therefore, if *Nobers II* "relates to" an ERISA plan, it is preempted even if it states an otherwise valid state law claim.

In determining whether *Nobers II* "relates to" an ERISA plan, we are guided by the Supreme Court's recent decision in *Ingersoll-Rand Corp. v. McClendon*, 111 S. Ct. 478 (1990), which reaffirmed the Court's expansive definition of "relationship to" ERISA plans, and therefore also confirmed the broad scope of ERISA preemption established in earlier cases such as *Pilot Life Insurance Co. v. Dedeaux*, 481 U.S. 41, 107 S. Ct. 549 (1987), and *Metropolitan Life Insurance Co. v. Taylor*, 481 U.S. 58, 107 S. Ct. 1542 (1987). In

Ingersoll-Rand, the plaintiff filed a wrongful discharge action based on state law tort and contract theories, alleging that his employer terminated him out of a desire to avoid contributing to the pension fund. The Supreme Court unanimously held that the action was preempted.

Six Justices concluded that because the existence of an ERISA plan was a critical factor in establishing liability, and because the trial court's inquiry would be directed to the plan, the suit "related to" an ERISA plan, and hence was preempted. Id. at 433. In short, if there were no plan, there would have been no cause of action. Moreover, all nine Justices agreed on the narrower ground that the suit was preempted because it conflicted directly with an ERISA cause of action. The Court observed that section 510 of ERISA, 29 U.S.C. § 1140 (1988), creates a cause of action for interfering with the attainment of a right under an ERISA plan, and the plaintiff could and should have sued on that federal cause of action. 111 S. Ct. at 485.

Ingersoll-Rand controls the preemption question in this case. The plans are certainly correct that the claim in *Nobers II* depends on the existence of an ERISA plan. If an ERISA plan did not exist, the appellees would never have brought *Nobers II*. Furthermore, the trial court's inquiry in *Nobers II* would be directed to ERISA plans, in that the calculation of damages would involve construction of ERISA plans, even though Colt and Crucible, not the plans themselves, would not be liable for the damages. The appellees place great emphasis on the fact that *Nobers II* is a suit against an employer, not ERISA plans or their administrators.

But that defense is unavailing after *Ingersoll-Rand*, which concluded that ERISA preempted a suit against an employer.[2]

In sum, *Nobers II* "relates to" an ERISA plan and is accordingly preempted by ERISA section 514(a), 29 U.S.C. § 1144(a).[3] Moreover, although actions under section 502(a)(1)(B) of ERISA, 29 U.S.C. § 1132(a)(1)(B), to recover benefits due under a plan, to enforce rights under a plan, or to clarify rights to future benefits under a plan, are subject to concurrent state and federal jurisdiction, see ERISA section 502(e)(1), 29 U.S.C. § 1132(e)(1), *Nobers II* is not such an action. As a result, even if *Nobers II* had been properly brought under ERISA, federal jurisdiction over the appellees' claim would have been exclusive. Id.

2. *Availability of an Injunction*

According to the plans, the district court should have granted an injunction to protect its exclusive

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2. The appellees also rely on *Fort Halifax Packing Co. v. Coyne*, 481 U.S. 1, 107 S. Ct. 2211 (1987), but that case is easily distinguished. There the Supreme Court held that ERISA did not preempt a Maine severance pay statute because it did not "relate to" employee benefit *plans* (as opposed to employee benefits in general). To be preempted, held the Court, a statute must have some connection to an ERISA plan, and the Maine statute did not establish or require an employer to maintain a plan, nor did it threaten the underlying purposes of ERISA. Here, in contrast, a plan most certainly exists, and the appellees measure their damages in *Nobers II* by reference to that plan.

3. Because of this conclusion, we need not also decide whether *Nobers II* is preempted under the alternative rationale in *Ingersoll-Rand* – that ERISA section 510, 29 U.S.C. § 1140, provides the plaintiffs a cause of action that directly conflicts with the state law claims asserted in the state court suit.

jurisdiction over this general subject matter. The Supreme Court, however, has repeatedly held that federal preemption, or even a statutory grant of exclusive federal jurisdiction, does not, by itself, provide federal courts with the power to enjoin illegal state proceedings. In *Choo*, for example, the Supreme Court reiterated its earlier holding that

> a federal court does not have inherent power to ignore the limitations of [28 U.S.C.] § 2283 and to enjoin state proceedings merely because those proceedings interfere with a protected federal right or invade an area pre-empted by federal law, even when the interference is unmistakably clear.

486 U.S. at 149, 108 S. Ct. at 1691 (1988) (quoting *Atlantic Coast Line*, 398 U.S. at 294, 90 S. Ct. at 1747).

In *Amalgamated Clothing Workers*, the Court rejected outright the position pressed by the plans here, when it ruled that the Anti-Injunction Act "does not apply whenever the moving party in the District Court alleges that the state court is 'wholly without jurisdiction over the subject matter, having invaded a field pre-empted by Congress.'" 348 U.S. at 515, 75 S. Ct. at 455.[4] See also *Texas*

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4. The plans rely on *Capital Service, Inc. v. NLRB*, 347 U.S. 501, 74 S. Ct. 699 (1954), but in that case the Supreme Court held that a federal injunction against enforcement of a state court order was necessary in aid of the district court's jurisdiction over the particular case before it (an action by the NLRB to enjoin picketing pending the adjudication of an unfair labor practice complaint). In dictum, the Court stated that "where Congress, acting within its constitutional authority, has vested a federal agency with exclusive jurisdiction over a subject matter and the intrusion of a state would result in the conflict of functions, the federal court may enjoin the state

Employers' Insurance Association v. Jackson, 862 F.2d 491, 498-99 (5th Cir. 1988) (en banc). In essence, the "necessary in aid of its jurisdiction" exception is narrow and applies only in aid of a court's exclusive jurisdiction over a particular case, not over a general class of cases. Accordingly, the typical application of this exception has been in removal cases (where a district court must ensure its exclusive governance of the particular litigation removed)[5] and in *in rem* cases (where, under the traditional view, only one court can entertain jurisdiction over a particular

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proceeding." Id. at 504, 74 S. Ct. at 702. That discussion was preceded, however, with the qualification "[i]n absence of a command of the Congress to the contrary," and was followed with a mention of just such a command, the Anti-Injunction Act.

The plans also cite *Bowles v. Willingham*, 321 U.S. 503, 64 S. Ct. 641 (1944), which involved the predecessor of section 2283, but we believe that *Bowles* rested on the Court's interpretation of section 205 of the Price Control Act as creating an exception to the predecessor of section 2283. See *Porter v. Dicken*, 328 U.S. 252, 255 & n.1, 66 S. Ct. 1094, 1096 & n.1 (1946). *Bowles* therefore has no application here.

Finally, the plans cite and essentially rely on the reasoning of Chief Justice Warren in his dissent in *Amalgamated Clothing*, which recited the legislative history behind the Anti-Injunction Act and the case law under its predecessor, including *Bowles*. Suffice it to say that we cannot follow the dissenting views of three Justices when a majority of the Court rejected them not only then, but consistently in succeeding cases.

5. The removal cases may also fall under the "expressly authorized" exception, because 28 U.S.C. § 1446(e) (1988) provides that upon removal the "State court shall proceed no further unless and until the case is remanded." See *Mitchum v. Foster*, 407 U.S. 225, 234-37, 92 S. Ct. 2151, 2158-59 (1972).

physical *res*). See Erwin Chemerinsky, *Federal Jurisdiction* § 11.2.3 at 563-65 (Little, Brown, 1989). See also *Jennings v. Boenning & Co.*, 482 F.2d 1128, 1131-35 (3d Cir. 1973).

Under this exception to the Anti-Injunction Act, then, the plans must show that an injunction of *Nobers II* is necessary in aid of the district court's jurisdiction over the very case before it: the plans' declaratory judgment action. In *Atlantic Coast Line*, the Court emphasized the word "necessary," and held that for the exception to apply, a state court case must "so interfer[e] with a federal court's consideration or disposition of a case as to seriously impair the federal court's flexibility to decide that case." 398 U.S. at 295, 90 S. Ct. at 1747. In this case, *Nobers II* does not purport to determine the plans' obligations. The plans are not even parties to *Nobers II*, so we find no reason to conclude that an injunction of *Nobers II* is necessary for the district court in aid of its jurisdiction over this case.

In sum, the Pennsylvania court's assumption of jurisdiction over *Nobers II* is in violation of ERISA's supersedure provisions, but an injunction does not lie simply because of that fact. Instead, we must assume that the state courts will faithfully follow federal law. On that score, we note that the preemption issue here was not definitively resolved until *Ingersoll-Rand*, which was decided *after* the Pennsylvania Superior Court had ruled that *Nobers II* was not preempted. Perhaps the Pennsylvania trial and intermediate appellate courts will now reconsider their holding. If not, then the proper avenue of redress is appeal through the state court system, and ultimately, if necessary, to the United

States Supreme Court. See *Atlantic Coast Line*, 398 U.S. at 287, 90 S. Ct. at 1743.

B. *"Expressly Authorized by Act of Congress"*

A federal court may enjoin a state proceeding if "expressly authorized by Act of Congress." 28 U.S.C. § 2283 (1988). That wording is deceptively simple, however. The Supreme Court has emphasized that the injunction-authorizing statute need not expressly refer to the Anti-Injunction Act. *Amalgamated Clothing Workers*, 348 U.S. at 516, 75 S. Ct. at 455 ("no prescribed formula is required; an authorization need not expressly refer to § 2283"). Moreover, the Court has also unanimously held that "a federal law need not expressly authorize an injunction of a state court proceeding in order to qualify" under the "expressly authorized" exception. *Mitchum v. Foster*, 407 U.S. 225, 237, 92 S. Ct. 2151, 2159 (1972).[6] Instead, the test is more complex:

> [I]t is clear that, in order to qualify as an "expressly authorized" exception to the anti-injunction statute, an Act of Congress must have created a specific and uniquely federal right or remedy, that could be frustrated if the federal court were not empowered to enjoin a state

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6. In *Mitchum*, all seven Justices taking part joined Justice Stewart's opinion of the Court. Justices Powell and Rehnquist took no part in the case. Chief Justice Burger and Justices White and Blackmun concurred to emphasize that even when the Anti-Injunction Act does not bar an injunction against a state court proceeding, principles of equity, comity, and federalism may independently weigh against an injunction, as in *Younger v. Harris*, 401 U.S. 37, 91 S. Ct. 746 (1971), and its progeny.

> proceeding. This is not to say that in order to come within the exception an Act of Congress must, on its face and in every one of its provisions, be totally incompatible with the prohibition of the anti-injunction statute. The test, rather, is *whether an Act of Congress, clearly creating a federal right or remedy enforceable in a federal court of equity, could be given its intended scope only by the stay of a state court proceeding.*

Id. at 237-38, 92 S. Ct. 2159-60 (emphasis added; footnote and citations omitted).

In *Mitchum* itself, the Supreme Court had no trouble concluding that 42 U.S.C. § 1983 was an "expressly authorized" exception allowing injunctions of state courts, even though the statute on its face merely authorized suits in equity without specifying state courts as the subjects. The Court detailed the legislative history of section 1983, and found that the Civil Rights Act of 1871 was clearly intended to enforce the Fourteenth Amendment against state action, including judicial action. 407 U.S. at 238-43, 92 S. Ct. at 2156-60. The *Mitchum* test, however, has proven more difficult to apply to other statutes that also authorize injunctions in general (not specifically against state proceedings), but whose legislative intent regarding injunctions of state courts is less clear.

The only Supreme Court case on this point since *Mitchum* is *Vendo Co. v. Lektro-Vend Corp.*, 433 U.S. 623, 97 S. Ct. 2881 (1977), where the Court split three ways over whether section 16 of the Clayton Act, 15 U.S.C. § 26, "expressly authorized" injunctions against state court proceedings that

themselves violate the antitrust laws. The lead opinion by Justice Rehnquist, joined by Justices Stewart and Powell, concluded that although an antitrust action is a uniquely federal right or remedy, the Clayton Act could be given its intended scope without staying the state court proceeding. Distinguishing *Mitchum* by noting the lack of clear legislative history regarding the Clayton Act, id. at 633-35, 97 S. Ct. at 2888-89, and fearing that a broad reading would mean that all federal statutes authorizing general injunctions would be exceptions to the Anti-Injunction Act, id. at 635-39, 97 S. Ct. at 2889-91, Justice Rehnquist insisted that "the Act countenancing the federal injunction must necessarily interact with, or focus upon, a state judicial proceeding." Id. at 640-41, 97 S. Ct. at 2892.

That view, however, did not command a majority of the Court.[7] Justice Stevens, dissenting with Justices Brennan, White, and Marshall, believed that where the state proceedings were themselves an antitrust violation, they could be enjoined because only in that way could the antitrust laws be given their full scope. Id. at 656-58, 97 S. Ct. at 2900-01. Justice Blackmun, joined by Chief

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7. Justice Rehnquist's opinion is frequently referred to as the plurality opinion, but that is not technically correct. His opinion garnered three votes, and two Justices concurred in the result while disagreeing almost entirely with Justice Rehnquist's rationale. In fact, as we shall explain, the views of the two concurring Justices on the Anti-Injunction Act (as opposed to the underlying question of antitrust law) were closer to those of the four dissenting Justices. Justice Rehnquist's views were therefore only a plurality of the majority, not of the whole Court. We therefore refer to it as the lead opinion.

Justice Burger, appeared to agree with the dissenters on that point (the concurrence is somewhat ambiguous), but disagreed with them on the underlying issue of antitrust law. Because the concurring Justices believed that the state proceedings were not a pattern of baseless, repetitive claims, they agreed with Justice Rehnquist's conclusion that section 16 did not authorize the injunction given in that particular case. Id. at 643-45, 97 S. Ct. at 2893-94. Thus although six Justices seemed to believe that the Clayton Act authorizes injunctions of some state court proceedings, a majority held that no injunction was proper on those facts.

In this case, the plans contend that section 502(a)(3) of ERISA, 29 U.S.C. § 1132(a)(3) (1988), "expressly authorizes" injunctions of state courts violating section 502(e)(1) of ERISA, 29 U.S.C. § 1132(e)(1), the exclusive jurisdiction provision of ERISA discussed above. Section 502(a)(3) of ERISA provides that a participant, beneficiary, or fiduciary may bring an action

> (A) to enjoin any act or practice which violates any provision of this subchapter or the terms of the plan, or (B) to obtain other appropriate equitable relief (i) to redress such violations or (ii) to enforce any provisions of this subchapter or the terms of the plan[.]

29 U.S.C. § 1132(a)(3). The plans argue that because *Nobers II* violates the exclusive jurisdiction provision in subsection (e)(1) of that same section, subsection (a)(3) authorizes an injunction against *Nobers II*.[8]

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8. As an initial matter, the Fifth Circuit has questioned

We do not write on a clean slate on this subject. In *United States Steel Corp. Plan for Employees Insurance Benefits v. Musisko*, 885 F.2d 1170 (3d Cir. 1989), this court held that ERISA contained no "express authorization" of an injunction of preempted state proceedings. We noted that nothing in the language of ERISA section 502(a)(3), 29 U.S.C. § 1132(a)(3), suggests that Congress intended that injunctions be granted against state tribunals exceeding their jurisdiction. We further searched the legislative history for such an indication and found none. Id. at 1177.

The plans suggest that *Musisko* is distinguishable because there the underlying state law claim was by a beneficiary to recover benefits from a plan, and under section 502(e)(1) of ERISA, 29 U.S.C. § 1132(e)(1), federal jurisdiction over such claims (if brought under ERISA[9]) is not exclusive, but concurrent with state courts'. Such a distinction of *Musisko* would be disingenuous. In *Musisko*, we did mention that state courts have concurrent jurisdiction over some ERISA claims, 885 F.2d at 1177, but our purpose there was to distinguish *Mitchum* and point out that Congress had no overarching distrust that state courts would disregard ERISA, unlike Congress's concerns about state court violations of section

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whether a state court suit truly "violates" 29 U.S.C. § 1132(e)(1), as the verb is used in 29 U.S.C. § 1132(a)(3). See *Total Plan Services v. Texas Retailers Association*, 925 F.2d 142, 144 (5th Cir. 1991). We will assume, however, that *Nobers II* "violates" the supersedure and exclusive jurisdiction provisions of ERISA.

9. The preemption and supersedure provision of ERISA section 514(a), 29 U.S.C. § 1144(a), still applies.

1983. The fact of concurrent jurisdiction in that particular case was irrelevant to the decision, as is the fact of exclusive jurisdiction in this case. See also *Total Plan Services v. Texas Retailers Association*, 925 F.2d 142, 145 n.2 (5th Cir. 1991) (following *Musisko* and rejecting arguments identical to those raised by the plans here).

At all events, even if *Musisko* were not binding precedent, we would conclude, under the standard in *Mitchum*, that ERISA can be given its intended scope without enjoining suits such as *Nobers II*. Although Congress established exclusive federal jurisdiction over some ERISA claims, the plans offer no evidence that Congress so distrusted state courts that it expected that state courts would fail to comply in good faith with the supersedure and exclusive jurisdiction provisions of ERISA. Moreover, although at least four and perhaps six Justices in *Vendo* may have concluded that in order to fully enforce the Clayton Act, federal courts needed to be able to restrain *substantive* violations of that Act (including repetitive, harassing state court lawsuits), *Nobers II* does not force the plans to violate *substantive* ERISA law. Even if *Nobers II* goes to trial and the appellees prevail, Colt and Crucible, not the plans, will pay the judgment. No assets of the plans will be transferred, and *Nobers II* will have no binding effect on the plans, so it will not prevent them from complying with ERISA.

The plans ask us to follow *General Motors Corp. v. Buha*, 623 F.2d 455 (6th Cir. 1980), which held that ERISA expressly authorized an injunction against a state court writ garnishing ERISA benefits. In *Musisko*, we expressed reservations about *Buha*, but felt it distinguishable. The Fifth

Circuit in *Total Plan Services* went even futher and rejected *Buha* outright. We reaffirm our conclusion in *Mustsko* that *Buha* is questionable but distinguishable. Whereas in *Buha* the Sixth Circuit concluded that the state writ would have made it impossible for the plan fiduciary there to carry out its duties under ERISA, we see no reason why the appellees' success in *Nobers II* will make it impossible for these plans to comply with ERISA.

In sum, we hold that section 502(a)(3) of ERISA, 29 U.S.C. § 1132(a)(3), does not "expressly authorize" injunctions of state court actions simply because they are preempted by ERISA, even if the state court claims are subject to exclusive federal jurisdiction.

C. *"To Protect or Effectuate Its Judgments"*

Finally, the plans contend that an injunction is necessary to protect and effectuate the district court's judgment in *Nobers I*, which, among other things, rejected the appellees' LMRA claims and dismissed their ERISA claims for failure to join proper parties and to exhaust administrative remedies. The plans, however, were not parties in *Nobers I*, and they have not explained why they have standing to seek such an injunction under this res-judicata-based exception to the Anti-Injunction Act. At all events, Colt and Crucible, which were parties to *Nobers I*, sought an injunction on precisely this ground in 1985. The district court denied the injunction, and this court affirmed. *Colt Industries v. Nobers*, No. 85-563 (W.D. Pa. Aug. 12, 1985), aff'd, 787 F.2d 581 (3d Cir. 1986). We see no basis to reexamine that question now, when the same claim has been brought in a different guise.

III. CONCLUSION

Although ERISA preempts the appellees' state-law claims in *Nobers II*, the appellant plans are not entitled to an injunction against *Nobers II* because none of the three exceptions to the Anti-Injunction Act applies. The judgment of the district court will therefore be affirmed.

A True Copy:
Teste:

Clerk of the United States Court of Appeals
for the Third Circuit

IN THE
UNITED STATES DISTRICT COURT FOR THE
WESTERN DISTRICT OF PENNSYLVANIA

THE 1975 SALARIED RETIREMENT PLAN, et al.,
Plaintiffs,
v.
DAVID A. Nobers, et al.,
Defendants.

Civil Action 90-80

ORDER OF COURT

AND NOW, this 26th day of June 1991,

IT IS ORDERED that judgment be and hereby is entered on behalf of defendants and against plaintiffs with respect to all equitable claims of plaintiffs for the reasons set forth in the order of May 30, 1991.

/s/ DONALD E. ZIEGLER
Donald E. Ziegler
United States District Judge

cc: Counsel of record.

IN THE
UNITED STATES DISTRICT COURT FOR THE
WESTERN DISTRICT OF PENNSYLVANIA

THE 1975 SALARIED RETIREMENT PLAN, et al.,
Plaintiffs,
v.
DAVID A. NOBERS, et al.,
Defendants.

Civil Action 90-80

ORDER OF COURT

AND NOW, this 30th day of May 1991, after consideration of the submissions of the parties, the court finds as follows:

1. Plaintiffs filed an amended complaint in which they seek declaratory and equitable relief. Specially, in Counts II, III, VI and VII, plaintiffs seek to enjoin ongoing state court proceedings in the Court of Common Pleas of Beaver County, Pennsylvania.

2. Plaintiffs have failed to establish irreparable harm from the ongoing state court proceedings because any relevant defenses can and should be raised within the context of the breach of employment contract claims of defendants' grounded on state law.

3. Plaintiffs have failed to establish likely success on the merits with respect to the defenses based on federal law because these arguments have been considered and rejected by this court and the Court of Appeals.

4. Plaintiffs are not likely to succeed on the merits of their claims of preemption.

5. Defendants' proposed findings of fact and conclusions of law are adopted as the findings and conclusions of the court because they accurately reflect the posture of the litigation, the conclusions of this and other courts, the impact of this litigation on defendants' claims in state court, and the

adequacy of a remedy of law to plaintiffs in the state court proceedings.

6. Plaintiffs' claims for equitable relief will be denied.

7. Plaintiffs' request for an extended period of discovery with regard to their claims for declaratory relief will be granted.

IT IS THEREFORE ORDERED that plaintiffs' claims and request for equitable relief be and hereby are denied because plaintiffs have failed to meet the test for equitable relief by a preponderance of the evidence.

IT IS FURTHER ORDERED that plaintiffs' request for 60 days of discovery relevant to the claims for declaratory relief be and hereby is granted.

/s/ DONALD E. ZIEGLER

Donald E. Ziegler
United States District Judge

cc: Counsel of record.

IN THE
UNITED STATES DISTRICT COURT FOR THE
WESTERN DISTRICT OF PENNSYLVANIA

DAVID A. NOBERS, ROBERT R. CAMPBELL, JR., GASPAR P. PORTO, GARY T. WEEKLEY, individually and on behalf of themselves and all others similarly situated,
Plaintiffs,

v.

CRUCIBLE INC., a corporation, COLT INDUSTRIES, INC., a corporation, UNITED STEELWORKERS OF AMERICA, INTERNATIONAL UNION, an unincorporated association, UNITED STEELWORKERS OF AMERICA, LOCAL UNION 1212, an unincorporated association, UNITED STEELWORKERS OF AMERICA, LOCAL UNION 3177, an unincorporated association, UNITED STEELWORKERS OF AMERICA, LOCAL UNION 5047, an unincorporated association, and MELLON BANK, N.A., a corporation,
Defendants.

Civil Action 82-1846

ORDER OF COURT

AND NOW, this 10th day of December, 1982,

IT IS ORDERED that the motion of plaintiffs for leave to file an amended complaint be and hereby is granted.

IT IS FURTHER ORDERED that the above civil action be and hereby is certified as a class action pursuant to Rule 23(a) and (b)(1) and (2) of the Federal Rules of Civil Procedure.

IT IS FURTHER ORDERED that the class be and hereby is composed of all non-union, salaried, supervisors or managers who were former members on one of the bargaining units represented by Local Unions 1212, 3177 and 5047, and United Steelworkers of America, International Union, at the Midland Plant of defendants, Crucible, Inc. and Colt Industries, Inc.

IT IS FURTHER ORDERED that the motions of defendants for summary judgment be and hereby are granted with respect to Counts 1, 2, 3 and 5 of the original complaint, and Counts 1, 2, 3, 5 and 6 of the amended complaint.

IT IS FURTHER ORDERED that the motions of defendants to dismiss Count 4 of the original complaint and amended complaints be and hereby are granted.

/s/ DONALD E. ZIEGLER

Donald E. Ziegler
United States District Judge

cc: Thomas H. M. Hough, Esq.
1200 Lawyers Building
Pittsburgh, PA 15219

Paul Whitehead, Esq.
Five Gateway Center
Pittsburgh, PA 15222

William H. Powderly, II, Esq.
P. O. Box 2009
Pittsburgh, PA 15230

IN THE
SUPREME COURT OF THE UNITED STATES FOR THE
WESTERN DISTRICT OF PENNSYLVANIA

DAVID A. NOBERS, et al.,
Plaintiffs,
v.
CRUCIBLE INC., et al.,
Defendants.

Civil Action
No. 82-1846

Transcript of hearing on Motion to Dismiss at Pittsburgh, Pennsylvania, on Friday, December 11, 1982.

BEFORE: DONALD E. ZIEGLER, United States District Judge.

APPEARANCES:

THOMAS H.M. HOUGH and GREGORY GLEASON, 1200 Lawyers Building, Pittsburgh, Pennsylvania 15219, appearing in behalf of the Plaintiffs.

WILLIAM H. POWDERLY, III and PHILIP A. MISCIMARRA, Reed, Smith, Shaw and McClay, 747 Union Trust Building, Pittsburgh, Pennsylvania 15219, appearing in behalf of Defendants Crucible Inc. and Colt Industries, Inc.

PAUL WHITEHEAD, United Steelworkers of America, Five Gateway Center, Pittsburgh, Pennsylvania 15222, appearing in behalf of the Defendant United Steelworkers of America.

MR. WHITEHEAD: No, Your Honor.

THE COURT: All right. We will take a ten minute recess.

(Recess taken.)

THE COURT: All right. The following shall constitute findings of facts and conclusions of law.

No. 1. Plaintiffs are all non-union individual employees of Defendant Crucible Inc., who were formerly employed as

supervisors or managers at a plant operated by Defendant at Midland, Pennsylvania. Crucible is a subsidiary of Defendant Colt Industries, Inc. On or about October 15, 1982, the plant was permanently closed due to unfavorable economic conditions, reduced product demand and foreign competition.

No. 2. Crucible is a party to three collective bargaining agreements with Defendant United Steel Workers of America International Union. Each collective bargaining agreement involves a distinct local union representing different types of employment at the Midland facility. Local Union 1212 is a party to the basic agreement covering the production and maintenance employees. Local Union 5047 is a party to the melted products agreement covering hourly paid employees in the production, maintenance and research section of the melted products department. Local Union 3177 is a party to the clerical agreement covering office workers of both a clerical and technical nature.

No. 3. Crucible and the Local union Defendants have entered into a pension agreement with [sic] provides benefits for the employees covered by the three collective bargaining agreements. Defendant Mellon Bank is the trustee of this pension plan.

No. 4. On September 3, 1982, Plaintiffs filed this civil action on their own behalf and on behalf of a class consisting of non-union salaried supervisory and managerial employees of Crucible who had been employed at one time in one of the units covered by one of the collective bargaining agreements and represented by the Defendant Locals 1212, 3177 and 5047.

No. 5. Plaintiffs allege that historically when supervisory and managerial employees were laid off, Crucible returned the employees to the appropriate bargaining unit from which they were promoted. As a result, Plaintiffs assert that they are now entitled to return to their former bargaining units as of the date of their most recent layoffs which occurred prior to the closing of the plant. The company has refused to return these persons to their various bargaining units. This determination to lay off rather than demote has the effect of denying these employees various benefits under the collective bar-

gaining agreement and the pension agreement. Additionally, the refusal of Locals 1213, 3177 and 5047 to process grievances on behalf of the supervisors and managers allegedly constitutes a breach of their duty of fair representation.

No. 6. Crucible, Colt and the Union Defendants contend that Plaintiffs are explicitly excluded from the collective bargaining agreements since the agreements do not apply to supervisory or managerial employees. Additionally, Defendants contend that Plaintiffs have no vested right to return to the bargaining unit as a result of the previous acts of the company. These previous decisions according to the Defendant, were discretionary acts by Crucible and thus no vested rights were established. Accordingly, the company has no duty to return Plaintiffs to the bargaining unit, and the Union Defendants owe no duty of fair representation according to the defense. Finally, Defendants Crucible and Colt aver that even if some right was created by these previous decisions, the instant situation is distinguishable due to the permanent closing of the plant and the absence of collective bargaining units to which these Plaintiffs could now return.

No. 7. Defendants Mellon Bank, Crucible and Colt also deny that the benefits are owed either under the collective bargaining agreement or the pension agreement since Plaintiffs are not covered by any of these agreements. Additionally, even if Plaintiffs have a colorable claim to benefits under the agreement, Plaintiffs have failed to exhaust their remedies under each, which, in turn, deprives this Court of jurisdiction.

No. 8. From May 31 through October 31, 1982, Plaintiffs and the proposed class members received payments of severance benefits in excess of $865,000 from the Severance and Termination Allowance for Non-Union Salaried Employees Plan established by Crucible. This plan was established under the Employment Retirement Income Security Act of 1974, 29 U.S.C. Section 1001, et seq.

No. 9. Jurisdiction of this Court is founded upon Section 301 of the Labor Management Relations Act of 1947, 29 U.S.C. Section 185; the Declaratory Judgment Act, 28 U.S.C.

Section 2201; and the Employment Retirement Income Security Act of 1974.

No. 10. For the reasons that follow we hold that Plaintiffs have no right to be returned to the appropriate bargaining unit from which they were promoted. Consequently, the Union Defendants owe Plaintiff no duty of fair representation. Defendants' motions for summary judgment will be granted.

No. 11. The starting point of our analysis is Section 301 of the Labor Management Relations Act. That section reads as follows: "Suits for violation of contracts between an employer and a labor organization representing employees in an industry affecting commerce as defined in this chapter, or between any such labor organizations, may be brought in any district court of the United States having jurisdiction of the parties, without respect to the amount in controversy or without regard to the citizenship of the parties." The predicate for jurisdiction under the act is a contract between an employer and a labor organization. *International Brotherhood of Teamsters v. Western Pennsylvania Motor Carriers Association*, 660 F. 2d 76, 83 (3d Cir. 1981). Since the contracts between Crucible Inc., and the Defendants are the only bargaining agreements at issue, Plaintiffs' rights, if any, must arise from these agreements. Moreover, a breach of a separate agreement between an employer and an employee cannot provide a jurisdictional basis for relief under Section 301 because Congress has specifically used the term "Labor Organization." See, *Local No. 1 v. International Brotherhood of Teamsters*, 614 F.2d 846, 849, N.3, (3d Cir. 1980).

No. 12. The sole issue to be resolved by this Court is whether the collective bargaining agreements bestow upon Plaintiffs the right to return to their original bargaining units following their layoffs as supervisory or managerial employees. In our judgment, such a right must either be expressly stated in the agreements, or at a minimum the agreements must be worded in such a manner to permit on interpretation of such a right.

No. 13. Plaintiffs concede that no express language is contained in any of the collective bargaining agreements

which authorizes a right to return to a bargaining unit. However, the basic agreement and the clerical agreement contain a clause that Plaintiffs contend should be interpreted in this regard. The clause reads as follows: "Local working conditions in effect at the date of this Agreement shall continue in effect (a) unless the reason or justification for the condition changes or disappears or (b) unless the condition is modified by the parties. If the Union is not satisfied with the Company's reason or justification for modifying the working condition, the dispute may be submitted to the complaint and grievance procedure. In no case shall local working conditions be effective to deprive any employee of rights under this Agreement." The Basic Agreement, page 124; Clerical Agreement page 109. The Plaintiffs argue that one of the local working conditions in effect on the date of these agreements was Crucible's practice of permitting supervisors and managers to return to the bargaining unit at the time of either a layoff or removal from supervisory duties. We disagree.

No. 14. Although the term "local working conditions" is not defined in either the Basic or Clerical Agreements, there is no evidence that the parties intended the decision or act of returning supervisors or managers to the bargaining unit to be within this phrase. Rather, the words "local working conditions" refer to items that promote the working environment for employees. For example, a) office space for clerical employees; b) number and length of rest and coffee breaks; c) length of lunch period; and, d) smoking activities while working.

No. 15. Our conclusion is based on several factors: First, the general meaning of the words "working conditions" in the field of industrial relations refers to those types of items articulated in finding No. 13. See *Corning Glass Works v. Brennan*, 417 U.S. 188, 200-203 (1974). Although *Corning Glass* involved an interpretation of the term "working conditions" as used in the Equal Pay Act of 1963, the case provides a broad overview of the meaning of "working conditions" consistent with our conclusion here. Second, the three bargaining agreements explicitly grant to management the dis-

cretion to control the work force. This discretionary grant of power set forth in the collective bargaining contract undermines plaintiffs' argument that the phrase "local working conditions" should somehow now be construed to accord Plaintiffs some contractual basis to assert with regard to the phrase "local working conditions." The specific contract language granting the company the discretionary control of its work force is as follows: "The management of the works and the direction of the working forces, including the right to hire, suspend or discharge for proper cause, or transfer, and the right to relieve employees from duty because of lack of work, or for other legitimate reasons, is vested exclusively in the Company, provided that this will not be used for purposes of discrimination against any member of the Union." Also, the clause in the Clerical Agreement provides: "The management of the office and the direction of the working forces, including the right to hire, promote, demote, suspend or discharge for proper cause, or transfer, and the right to relieve employees from duty because of lack of work or for other legitimate reasons, is vested exclusively in the Company, provided, however, that in the exercise of such functions, the Company shall not alter any of the provisions of this Agreement and shall not discriminate against any employee because of his membership in, or lawful activity on behalf of, the Union." There is no evidence of improper or discriminatory activity for use of this power by Crucible, and we find no vested right to be returned to the bargaining unit as asserted by Plaintiff.

No. 16. Not only do Plaintiffs fail to point to express language in the collective bargaining agreement to support their contention that some vested right requiring the company to return laid off supervisory personnel to the bargaining units, the definition of an employee for purposes of bargaining unit membership establishes that Plaintiffs are without the bargaining units. A "recognition clause" is extant in all three agreements. Except for some insignificant wording, the clauses are identical and they read as follows: "The Company recognizes the Union as the exclusive collective bargaining representative for the employees of the Company

and for the purposes defined in Article 1." Each agreement then proceeds to define "employee" in a different manner owing to the different types of employment covered by each agreement. The basic agreement states that: "The term 'employee' as used in this Agreement, applies to all production and maintenance employees of the Company employed in and about the Company's steel-manufacturing, steel-fabricating and by-product coke plants, excluding foremen in charge of any classes of labor, office clerical workers, guards, or watchmen, confidential and salaried employees." The Clerical Agreement proceeds as follows: "The term 'employee' as used in this Agreement applies to employees of recognized office departments for whom the Union has been certified by the National Labor Relations Board as the exclusive collective bargaining representative, excluding department heads, assistant department heads, supervisors and employees of such departments doing work of a confidential nature and/or directly pertaining to management functions."

The Melted Products Agreement reads: "The Union represents and this contract applies only to hourly paid employees in the Company's production, maintenance and research Sections in its Vacuum Melted Products Department. The Union does not represent and this contract does not apply to: (a) foremen in charge of any class of labor, office clerical employees, guards or watchmen, salaried employees, and employees who do work of a confidential nature and/or which directly pertain to management functions, and (b) management trainees hired by the Company for work not covered by the contract but who may be assigned to work covered by the contract during their prescribed training period; provided, however, that these assignments shall not result in the layoff of employees covered by this Agreement." We find that Plaintiffs as supervisory or management personnel are not employees within the definition of "employee" in the collective bargaining agreements, and, accordingly, may not claim benefits resulting from the agreements. In this regard, as we understand Plaintiffs' argument, they do not dispute that they are without the bargaining units due to their supervisory or managerial status from a purely defini-

tional standpoint of "employee." Rather, Plaintiffs contend that although they were supervisors and managers before their layoff, at the moment they were laid off they no longer could exercise supervisory or managerial duties, and, thus, they became employees within the bargaining units. We disagree, because the layoff did not affect the status of the employees, either prior to or following the layoff. Plaintiffs were supervisors and managers at all times. Plaintiffs' argument is analogous to an employee attempting to argue that if an employee is laid off he or she is no longer an employee, and, thus, has no rights under the collective bargaining agreement. Obviously, a layoff cannot affect the status of an employee. *See Wallick and Schwalm Company*, 95 N.L.R.B. 1262 (1951). It follows that since Plaintiffs were supervisory and managerial employees Crucible and Colt Industries have no duty to arbitrate, nor do the Defendant Locals or the International, any issue with these persons. *See United Steelworkers Local 1617 v. General Fireproof Company*, 464 F.2d 726 (6th Cir. 1972) and *General Telephone Company of California v. Communications Workers of America*, 402 F.2d 255 (9th Cir. 1968). It further follows that the Local Unions have breached no duty of representation since they do not represent the Plaintiffs. *Cooper v. General Motors Corporation*, 651 F.2d 249 (5th Cir. 1981).

No. 17. The only sections of the agreement which grant any rights to the supervisory or managerial personnel deal with seniority. The seniority clauses of the Basic and Clerical Agreements are practically identical. The distinctions are irrelevant for the disposition of this matter at hand. The clause reads as follows: "In the event that the employee covered by this agreement is promoted following August 2, 1956, to a supervisory position not so covered, and is later demoted to a classification covered by this Agreement, the employee shall assume his seniority as accrued at the time of his promotion plus credit for time spent in the supervisory position up to two years following his promotion." And then there is a clause which deals with older employees. The seniority clause in the Melted Products Agreement states: "In the event an employee covered by this Agreement is tempo-

rarily transferred to a position not covered by this Agreement, he shall continue to accrue continuous service while such transfer remains temporary. An employee assigned as a temporary foreman on a weekly basis will not work overtime in the bargaining unit during the week in which he is assigned as a temporary foreman." Here Plaintiffs aver that Crucible and the United Steelworkers bargained over supervisory rights: First, by preserving accumulated seniority of bargaining unit members promoted to supervisor; second, by permitting these supervisors to accumulate bargaining unit seniority while serving as supervisors. As a result of this bargaining, Plaintiffs contend that the Union now owes the supervisors a duty of fair representation. We again disagree.

No. 18. The seniority clauses do not require the Company to demote rather than lay off. Rather, management has the sole discretion concerning control of the work force. Management alone can decide whether to demote or lay off supervisory and managerial persons. The seniority clause does not bind management to choose demotion over layoff or vice versa. *See United Steelworkers Local No. 1617 v. General Fireproof Company*, 464 F.2d 726 (6th Cir. 1972); *Gannon v. Baltd Anchor and Chain*, 459 F. Supp. 457 (E.D. Pa.), *aff'd mem.* 588 F.2d 820 (3d Cir. 1978). Consequently, the Unions only have a duty of fair representation to supervisors once they have been demoted. If management decides not to demote, the Union owes no duty to supervisors since they are not members of the collective bargaining unit. *Cooper v. General Motors Corporation*, 651 F.2d 249 (5th Cir. 1981).

No. 19. Plaintiffs' reliance upon *United Steelworkers of America v. Canron, Inc.*, 580 F.2d 77 (3d Cir. 1978), is misplaced. Plaintiffs contend that *Canron* holds that the question of arbitrability of a dispute is not determined by the status of the grievant but by the nature and duties of the obligations of the parties under contract. Thus, the issue is not whether Plaintiffs were supervisors or managers without the bargaining unit, rather whether Crucible bargained with the Union over rights and/or benefits. And in our judgment the facts in *Canron* are distinguishable. In *Canron* the Plaintiffs were retired employees claiming the employer under the collec-

tive bargaining agreement agreed to provide health and life insurance benefits for the retiree. Some of the retirees have never worked for Canron, but had worked for a subsidiary acquired by Canron. The collective bargaining agreement provided grievance procedures for members employed by the Company. Although the agreement delineated these benefits for retirees, the Company argued that as to those retirees who never worked for Canron, the grievance procedures were inapposite. The Court of Appeals concluded that the collective bargaining agreement was subject to an interpretation that the retirees could utilize the grievance procedure because the collective bargaining agreement was ambiguous. The Court was unable to say, as a matter of law, the grievance procedures excluded those retirees. Thus, arbitration was granted as to his issue.

No. 20. Here, to the contrary, this Court can unequivocally state that as a matter of law the supervisors and managers are not covered by the collective bargaining agreements. The agreements are perfectly clear, to wit, unless the supervisors are first demoted they have no rights. Ambiguity does not exist under our facts, and, accordingly, *Canron* is not controlling.

No. 21. For purposes of comprehensive appellate review, we will address the past decisions of Crucible in returning supervisors to the bargaining unit from a perspective other than an interpretation of the collective bargaining agreements. Although Plaintiffs in their complaint rely exclusively upon the Local working conditions clause to establish this right of return, it is possible to interpret the complaint as stating that past incidents constituted a modification of the collective bargaining agreement or agreements. The modification can be analyzed from two different perspectives: First, from the rights of the members in the bargaining unit; and, second, the binding effect upon the company and the supervisors resulting from modification by past action.

No. 22. If Plaintiffs were granted a vested right to return to the bargaining units, this would involve a modification of the collective bargaining agreements. Two portions of the agreement would be modified: First, the management discre-

tion clause would be affected because management would be prohibited from controlling the work force. Of more significance, the seniority clause would be altered because the motion would be automatic. Ostensibly, the rights of the members of the bargaining unit would be changed because a supervisor would be automatically demoted which conceivably could displace a member in the bargaining unit from his employment. Thus, the members have relinquished job security through no action of their own. Accordingly, a unilateral modification of the collective bargaining agreement would occur by management to the detriment of the members which is impermissible. See *N.L.R.B. v. Katz*, 369 U.S. 736 (1962).

No. 23. Aside from the effect upon the members of the bargaining units, a modification may alter the rights of management. Past practice will not create vested rights if the actions contradict the express terms of the collective bargaining agreements. *Ford Motor Company*, 19 LA 237, (1952) (Shulman, Arb.), especially when the past action involves a basic management function such as direction of the work forces. *LeBlond Machine Tool, Inc.*, 76 LA 827, (1981) (Keenan, Arb.). Applying this analysis to the facts at hand, management had absolute discretionary rights as expressed by the terms of the collective bargaining agreements. Accordingly, the past incidents of returning supervisors to the bargaining units did not create vested rights binding upon management. As a result, summary judgment will be entered for the Defendants on all claims except the claim posted under ERISA.

No. 24. We also find that this Court has no jurisdiction under ERISA because Plaintiffs have failed to sue the proper Defendant and exhaust their remedies in pursuing the matter against the pension plan. We will, therefore, enter a Rule 12(b) motion to dismiss the claim or claims of Plaintiffs posted on the ERISA counts. In all other regards, a motion for summary judgment will be entered.

Now, it seems to the Court that certification of the class is appropriate. Rule 23 provides requisites to a class action: One or more members of a class may sue or be sued as

representative parties on behalf of all only if, one, the class is so numerous that joinder of all members is impracticable, which applies here; two, there are questions of law or fact common to the class, which certainly applies here; three, the claims or defenses of the representative parties are typical of the claims of the class, which certainly applies here, and the Court so finds; and, four, the representative parties will fairly and adequately protect the interests of the class, which is true in this case. The representatives have fairly and adequately protected the interests of the class which we will certify. Counsel for the Plaintiffs is competent to represent this class. He is an experienced practitioner. The briefs and papers of record were very precise, and, indeed, outstanding on behalf of these claimants although he had a heavy burden in light of the precedent throughout this republic. And we find that the representative parties have fairly and adequately protected the interests of the class so as to authorize certification under Rule 23(a).

With regard to (b), an action may be maintained as a class action if the prerequisites of (a) are satisfied, and, in addition, one, the prosecution of the separate action by or against individual members of the class would create a risk of inconsistent or varying adjudication with respect to individual members of the class which would establish incompatible standards of conduct for the party opposing the class, and we find that that certainly is applicable here; or, (b), adjudications with respect to individual members of the class which would, as a practical matter be dispositive of the interests of the other members not parties to the adjudications or substantially impair or impede their ability to protect their interests – again, we find this is established under the circumstances; and, two, the party opposing the class has acted or refused to act on the grounds generally applicable to the class thereby making appropriate final injunctive relief or corresponding declaratory relief with respect to the class as a whole. The Court also finds as a fact that that situation has been established. Since we have certified this under a Rule 23(a) and (b)(1) and (2) class, there is no need that notifica-

tion be given to the other members of the class in light of the findings of this Court.

Now, the cases do indicate that the Court must be very careful in defining the class. The class in this instance is the non-union salaried employees of the Defendant Crucible who were formerly employed as supervisors or managers at a plant operated by Defendants in Midland, Pennsylvania, and who had been employed at one time in one of the units covered by one of the collective bargaining agreements and represented by the Defendant Locals 1212, 3177 and 5047.

A written order will follow.

Now, have I failed to address any issue, and is the class certification proper?

MR. POWDERLY: Yes.

THE COURT: All right. Anything further?

Very good. Thank you.

(Whereupon, the proceedings were concluded.)

Certified true and correct transcript.

_____

Colvin G. Vogel, Official Reporter

SUPERIOR COURT OF PENNSYLVANIA

PITTSBURGH DISTRICT

DAVID A NOBERS, ROBERT R. CAMPBELL, JR. GASPER P. PORTO, AND GARY T. WEEKLY, INDIVIDUALLY AND ON BEHALF OF THEMSELVES AND ALL OTHER SIMILARLY SITUATED,

Appellant

v.

CRUCIBLE, INC., A CORPORATION AND COLT INDUSTRIES, INC., A CORPORATION

No. 1251
Pittsburgh, 1987

ORDER

AND NOW, this 25th day of July, 1988, it is ordered as follows:

____ Order affirmed.

____ Order reversed.

X Judgment Reversed. Jurisdiction is relinquished.

____ Judgment of Sentence affirmed.

____ Judgment of Sentence reversed.

____ Order vacated and lower court directed to proceed in accordance with opinion filed herewith.

____ Order modified as set forth in opinion filed herewith.

____ Costs to be taxed as provided by Chapter 27 of the Pa.R.A.P.

____ Costs to be taxed as provided in opinion filed herewith.

____ Appeal quashed.

BY THE COURT

/s/ ELEANOR R. VALECKO

Deputy Prothonotary

IN THE SUPERIOR COURT OF PENNSYLVANIA

DAVID A. NOBERS, ROBERT R. CAMPBELL, JR., GASPER P. PORTO, AND GARY T. WEEKLY, INDIVIDUALLY AND ON BEHALF OF THEMSELVES AND ALL OTHERS SIMILARLY SITUATED,

Appellant

v.

CRUCIBLE, INC., A CORPORATION AND COLT INDUSTRIES, INC., A CORPORATION,

Appellee

No. 1251
Pittsburgh 1987

Appeal from the Judgment of the Court of Common Pleas of Beaver County, Civil at No. 843-1984.

BEFORE: TAMILIA, POPOVICH and HOFFMAN, JJ.

OPINION BY POPOVICH, J: Filed: July 25, 1988

This is an appeal from the judgment of the Court of Common Pleas of Beaver County granting the preliminary objections in the nature of a demurrer as to jurisdiction against the appellants/plaintiffs (David A. Nobers, Robert R. Campbell, Jr., Gasper P. Porto and Gary T. Weekly, individually, and on behalf of themselves and all other similarly situated). We reverse.

Since review of the sustainment of preliminary objections in the nature of demurrer is sought, the well-pleaded factual allegations set forth in the complaint are to be regarded as true. *Irti v. Equibank. N.A.*, 318 Pa. Super. 268, 464 A.2d 1336 (1983). Further, if the facts as pleaded state a claim for which relief may be granted under any theory of the law, then there is sufficient doubt to require the preliminary

objections in the nature of a demurrer to be rejected. *Mazzagatti v. Everingham*, 512 Pa. 266, 516 A.2d 672 (1986).

Viewed in this light, the record indicates that the plaintiffs filed a two-count complaint seeking "class action" certification to recoup damages from the appellees/defendants (Colt Industries, Inc. and its wholly owned subsidiary, Crucible, Inc., now incorporated as Colt Industries Operating Corp.) for violation of an alleged oral agreement/implied contract whereby the class of plaintiffs was "explicitly promised", at the time of promotion from a collective bargaining unit to a supervisory or managerial position, "a right to return to the bargaining unit from which promoted at the time of layoff or to be treated as a bargaining unit person on layoff status." (Paragraph 36)

Prior to the defendants ultimately closing all or part of their plant in Midland, the plaintiffs were laid-off or discharged as salaried employees instead of being returned to the bargaining unit out of which they initially were promoted or allowed to maintain laid-off status in the same unit. This, the plaintiffs contended, resulted in their incurment (sic) of damages "in the form of lost supplemental unemployment benefits . . . . lost immediate pension benefits . . . . lost pension benefits . . . [and] lost insurance benefits." (Paragraphs 43-46, 50-53)

Thereafter, the defendants filed a petition seeking to remove the suit to the United States District Court for the Western District of Pennsylvania on grounds of compliance with 28 U.S.C. § 1332 and 1441 (Diversity of citizenship and amount in controversy exceeded $10,000), as well as pendent and ancillary jurisdiction, the latter of which referred to the District Court's prior ruling in favor of the defendants regarding the same subject matter in *Nobers, et al. v. Crucible, Inc., et al.*, Civil Action No. 82-1846 (W.D. Pa. 1982), *aff'd mem.* 722 F.2d 733 (3rd Cir. 1983) warranting such a removal.

The plaintiffs responded by submitting a motion with the same court seeking to remand the case to Common Pleas Court. Therein, they claimed that the joint actions of the defendants, which were inseparable and not discrete, rendered removal under Section 1441 inappropriate. Further,

because the prior federal suit involved additional parties not presently named, was based on the Labor Management Relations Act (29 U.S.C. § 185) and was brought to enforce the terms of a collective bargaining agreement, as compared to an express or implied contract of employment, it was averred that "[t]here was no factual nexus between the two cases to which the principles of *res judicata* or collateral estoppel appl[ied] such that the Court's ancillary or pendent jurisdiction m[ight] be the basis for removal of the[] proceedings." The District Court agreed and entered an order to that effect on February 8, 1985.

Twenty days after the District Court remanded the suit to Common Pleas Court, the defendants filed preliminary objections in the nature of a demurrer contemporaneously with presenting a complaint in federal court to enjoin the plaintiffs' state action.

In its complaint, the defendants stated that the unfavorable outcome of the previous federal suit by the plaintiffs at No. 82-1846, being premised upon the same allegations of contractual breach, made the state suit nothing more than "an attempt to evade judgment in Civil Action No. 82-1846" by the plaintiffs. Additionally, the defendants asserted that the plaintiffs' claims seeking the recoupment of damages "relate[d] to an[] employee benefit plan[]", and, as a result, were exclusively within the province of the Employee Retirement Income Security Act[1] (ERISA) and not subject to review in state court.

The plaintiffs filed an answer to the federal complaint in which they alleged, *inter alia*, that the state action was premised upon "a common law claim for breach of contract" and not a violation of a collective bargaining agreement, as had been the case in the earlier federal suit. Thus, *res judicata* did not apply. Further, the plaintiffs went on to contend, "because there [were] no federal claims in the pending state court action", notions of federal pre-emption did not come into play since "[q]uestions of pre-emption are determined by reference to the basis of liability not the scope

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[1] 29 U.S.C. § 1000 et seq.

of the remedy." The end result of the federal complaint was its dismissal by court order dated August 12, 1985.

As for the content of its preliminary objections, the defendants averred that "no employment relationship" existed between Colt Industries, Inc. and the plaintiffs. Thus, no agreement, either oral or written, bound the two contractually. Also, because the plaintiffs' prior federal suit covered "virtually" the same subject matter, "[t]he instant action [was] . . . barred by the doctrine of *res judicata*." (Defendants' Complaint, Paragraph 12)

In response, the plaintiffs denied the availability to the defendants of *res judicata* or collateral estoppel as a defense since the issue litigated in the earlier federal suit (scope of collective bargaining agreement) was not identical to the present suit, which, in contrast, sought relief under "common law claims for breach of an express and/or implied contract of employment." (Plaintiffs' Response to Defendants' Preliminary Objections, Paragraph 3)

Prior to argument, the defendants filed an amendment to their preliminary objections contending that, by stipulation, the parties had agreed that the plaintiffs' suit against the defendant Colt Industries was for tortious interference of the plaintiffs' contract with Colt Industries Operating Corp., Colt's subsidiary. As such, the tort allegedly committed by Colt Industries, Inc. was "solely cognizable under Section 510 of . . . ERISA, 29 U.S.C. § 1140", resulting, so believed the defendants, in the state action being pre-empted by Section 514 of ERISA, 29 U.S.C. § 1144 and subject to dismissal.

Following argument, the Common Pleas Court issued an order granting the defendants' preliminary objections as to jurisdiction and dismissed the action. This timely appeal ensued.

The sole contention raised centers upon whether the plaintiffs' common law cause of action for breach of contract, alleging the loss and seeking the reinstatement of supplemental unemployment, pension and insurance benefits, is preempted by ERISA so as to divest Common Pleas Court of jurisdiction to hear the complaint.

As noted most recently by a panel of this Court:

> "[T]he question whether a certain state action is preempted by federal law is one of congressional intent. '"The purpose of Congress is the ultimate touchstone."'"

Engle v. West Penn Power Co., ____ Pa. Super. ____, ____, 530 A.2d 913, 915 (1987) (Citation omitted).

In light of the aforesaid, we observe that Congress enacted ERISA to afford comprehensive federal protection of the interests of participants in employee benefit plans. See 29 U.S.C. § 1001; *Lukus v. Westinghouse Electric Corp.*, 276 Pa. Super. 232, 419 A.2d 431 (1980) (*allocatur refused*, June 1, 1980). Instantly no one disputes that the defendants' Supplemental Unemployment Benefit Plan, Pension Agreement and Program Insurance Benefits fall under the label of either an employee benefit plan, defined benefit plan or welfare benefit plan, respectively. (See RR 22a, 40a and 87a) And, as such, are subject to the provisions of ERISA. See 29 U.S.C. § 1003. State regulation of the plans is therefore restricted by 29 U.S.C. § 1144, which provides:

> (a) Except as provided in subsection (b) of this section, the provisions of this subchapter and subchapter III of this chapter shall supersede any and all State laws insofar as they may now or hereafter *relate to* any employee benefit plan. . . .
>
> ° ° °
>
> (c) For purposes of this section:
>
> (1) The term "State law" includes all laws, decisions, rules, regulations, or other State action having the effect of law, of any State.
>
> . . . .
>
> (2) The term "State" includes a State, and political subdivisions thereof, or any agency or instrumentality of either, which purports to regulate, directly or indirectly, the terms and conditions of employee benefit plans covered by this subchapter.

(Emphasis added)

It is the position of the defendants and the court below that the plaintiffs' claim for damages, inasmuch as it seeks satisfaction through the attainment of benefits provided for under the various plans, "related to" employee benefit plans. This, in turn, brings the plans within the ambit of ERISA's pre-emptive status, and, as a result, subjects the suit to exclusive federal jurisdiction. (See Defendants' Brief at 7; Lower Court's Opinion at 7) We find the contentions of the defendants and court below to be disingenuous, and we do so on the instructive case of *Shaw v. Westinghouse Electric Corp.*, 276 Pa. Super. 220, 419 A.2d 175 (1980) (*reargument denied*, July 8, 1980).

In *Shaw*, the plaintiff filed a two-count complaint in assumpsit, the first portion of which concerns us since it was alleged therein that the plaintiff's employer breached its contract with Shaw by not paying him promised salary increases. It was further averred that, as a result of the breach, Shaw sustained losses in (1) "retirement and disability benefits" and (2) "pension benefits".

Prior to completion of the trial, the employer filed a motion to dismiss the action on the ground that ERISA rendered the court without jurisdiction over the subject matter of the complaint. With the denial of the motion, an appeal was perfected to this Court. In the course of denying the employer's arguments with regard to the pre-emptive effect of ERISA, we wrote:

> Section 1144(a) explicitly states that the provisions of ERISA supersede State laws only "insofar as they . . . *relate* to any employee benefit plan." The question for disposition, therefore, is whether Shaw's assumpsit action against Westinghouse for disability and retirement benefits may be said to "relate to" the disability benefits and retirement pension plans established by Westinghouse for its employees. More precisely, the question is whether Shaw's assumpsit action constitutes an attempt to regulate areas explicitly governed by the provisions of ERISA, or whether the action relates primarily to matters not governed by ERISA, and only indirectly affects Westinghouse's employee benefit plans in a way not in

conflict with the purposes of [sic] ERISA is designed to achieve. If the former is true, then the action may be pre-empted by section 1144; but if the latter is true, the action is not pre-empted. See *Lukus v. Westinghouse Electric Corp., supra* (collecting cases); *Commonwealth ex rel. Magrini v. Magrini*, 263 Pa. Super. 366, 398 A.2d 179 (1979).

* * * *

The present case . . . involve[s] . . . alleg[ations] that Westinghouse established a plan providing fewer benefits than the benefits Westinghouse promised him, Shaw alleges that Westinghouse has paid him less salary and fewer bonuses than it promised to pay, and that as a result, he has received, and will continue to receive in the future, fewer benefits under Westinghouse's disability benefits and retirement pension plans than he would have received had he been properly paid by Westinghouse. Thus, in order for Shaw to recover on his claims, the lower court will be required to determine what Shaw's benefits would have been *under the plans* had Westinghouse paid him the promised salary increases and bonuses. Additionally, the court may be required to determine whether Shaw will have a future claim against the disability benefits and retirement pension plans for increased benefits based upon a judgment recovered against Westinghouse on his salary and bonus claims. Should the lower court find it necessary to address such issues, then it might be argued that the lower court would be making an adjudication "relating to" the plans. We are, nevertheless, unable to conclude that the lower court's adjudication would violate section 1144 of ERISA.

Initially, we note that section 1132(e)(1) of ERISA grants state courts competent [sic] jurisdiction and federal district courts concurrent jurisdiction of an action brought by a participant in an employee benefit plan to recover benefits due to him under the terms of the plan, or to enforce his rights under the terms of the plan, or to clarify his rights to future benefits under the terms of the

plan. Thus, Congress has explicitly given state courts the power to adjudicate the very issues the lower court may be required to reach in Shaw's suit against Westinghouse.

* * * *

...the nature of Shaw's action and the limitation in section 1144(a) of ERISA that only state laws that "relate to" employee benefit plans are superseded by the Act. Shaw's suit against Westinghouse relates solely to Westinghouse's liability for breach of an employment contract. Admittedly, in determining Westinghouse's liability, the lower court may have to make determinations concerning Shaw's present and future rights to benefits under Westinghouse's plans, and decide whether Shaw's right to participate in the plans has been wrongfully impaired by Westinghouse. Yet, these determinations will affect only the rights and liabilities of the parties to this action (*i.e.*, Shaw and Westinghouse) towards each other; specifically, unless Westinghouse and its employee benefits plans are privies or the plans perform some act that estops them from questioning the lower court's determinations at a later date, the determinations of the lower court in this case will not conclude the rights and liabilities of the plans and Shaw *inter se*. *See generally Safeguard Mutual Ins. Co. v. Williams*, 463 Pa. 567, 574, 345 A.2d 664, 668 (1975); *Albert v. Lehigh Coal & Nav. Co.*, 431 Pa. 600, 613, 246 A.2d 840, 846 (1968); *Thompson v. Karastan Rug Mills*, 228 Pa. Super. 260, 323 A.2d 341 (1974).

276 Pa. Super. at ____-____, 419 A.2d at 179-180 (Footnote omitted; emphasis in original).

At bar, as in *Shaw*, the plaintiffs' suit relates solely to the defendants' liability for breach of an employment contract, the existence of which is in dispute and, therefore, subject to resolution by a fact-finder. More importantly, as pointed out in *Shaw*, the plaintiffs' rights to benefits and whether participation under the various plans have been wrongfully denied "affect[s] only the rights and liabilities of the parties to this action", and "the determinations of the lower court in this

case will not conclude the rights and liabilities of the plans and [the plaintiffs] *inter se.*" *Id.*

The association between the suit and the plans being tangential at best, we fail to see how ERISA is any more than incidentally involved, a factor which counsels against us concluding that the plaintiffs' claim is pre-empted by ERISA. To the same effect see *Welsh v. Northern Telecom, Inc.*, 354 S.E.2d 746 (Ct. App. N.C. 1987); *Golen v. Chamberlain Manufacturing Corp.*, 139 Ill.App.3d 53, 93 Ill.Dec. 677, 487 N.E.2d 121 (1985); and *Shaver v. N.C. Monroe Construction Co.*, 306 S.E.2d 519 (Ct. App. N.C. 1983), and compare with *B.F. Tatterson v. Koppers Co., Inc.*, 312 Pa. Super. 326, 458 A.2d 983 (1983).

Since we conclude that *Shaw* controls the outcome of this case and warrants a reversal of the lower court's actions, we see no need to engage in a dissertation of the law other than what has already been stated on the subject under review.

Accordingly, consistent with our findings this day, we reverse the judgment of the court below. Jurisdiction is relinquished.

Opinion filed - August 7, 1987 - Judge Joseph S. Walko

DAVID A. NOBERS, ROBERT R. CAMPBELL JR., GASPER P. PORTO and GARY T. WEEKLY, individually and on behalf of themselves and all others similarly situated,

Plaintiffs

v.

CRUCIBLE INC., a corporation and COLT INDUSTRIES, INC., a corporation,

Defendants

No. 843 of 1984

PRELIMINARY OBJECTIONS - ERISA - PRE-EMPTION - LACK OF JURISDICTION

1. If the well-pleaded material, relevant facts and every inference fairly deducible from those facts state a claim for which relief may be granted under any theory of law, then there is sufficient doubt to require the preliminary objection in the nature of a demurrer must be rejected.

2. Section 502 of ERISA sets forth a comprehensive enforcement scheme for civil actions which may be brought by a participant or beneficiary. 29 U.S.C. § 1132.

3. A state law which "relate(s) to any employee benefit plan" is pre-empted by ERISA, § 514(a),(b)(2)(A), 29 U.S.C. § 1144(a),(b)(2)(A).

4. The express pre-emption provisions of ERISA are deliberately expansive and are designed to establish pension plan regulation is exclusively a federal concern.

5. The phrase "relate to any employee benefit plan" must be given its broad common sense meaning so that if a state law has a connection with or reference to such a plan, it is pre-empted.

6. Plaintiffs' Complaint seeks damages in the form of lost supplemental unemployment benefits, lost immediate pension benefits, lost pension benefits in the event of a plant closing and lost insurance benefits. Because Plaintiffs claim for damages goes directly to the establishment of a benefit plan, plaintiffs' claim does "relate to an employee benefit plan." Therefore, as mandated by the ERISA provisions, this Court is without jurisdiction.

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COURT OF COMMON PLEAS FOR THE
COUNTY OF BEAVER
PENNSYLVANIA
Civil Division

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OPINION

WALKO, J. August 7, 1987

Presently before the Court are the Preliminary Objections filed by Defendants Crucible Inc. and Colt Industries, Inc. (Colt) in which they argue that the allegations raised in Plaintiffs' Complaint are barred by the doctrine of *res judicata* and that the Court lacks jurisdiction over the claim for Defendant Colt's tortious interference with the contractual relationship between Defendant Colt Industries Operating Corporation (CIOC) (formerly Crucible, Inc.) and Plaintiffs.

A preliminary objection in the nature of a demurrer admits as true all well-pleaded material, relevant facts and every inference fairly deducible from those facts. Only where the Complaint clearly and without a doubt fails to state a claim for which relief may be granted can a demurrer be sustained. *County of Allegheny v. Commonwealth*, 507 Pa. 360, 372, 490 A.2d 402, 408 (1985). If the facts as pleaded state a claim for which relief may be granted under any theory of

law, then there is sufficient doubt to require the preliminary objection in the nature of a demurrer to be rejected. *Mazzagatti v. Everingham by Everingham*, ___ Pa. ___, ___, 516 A.2d 672, 675 (1986).

It is under the above standard of review that we analyze the facts, stipulated to by the parties, of the present case.

On June 25, 1984, Plaintiffs, supervisors of Crucible, filed the instant Complaint alleging that at the time of their supervisory promotion there was an oral and/or implied contract containing a right, at the time of layoff, to return to the bargaining unit from which they were promoted or to be treated as a bargaining unit person in layoff status. Plaintiffs claim that Defendants have breached this provision which has resulted in the loss of immediate and future pension, insurance, severance and other benefits. Plaintiffs also allege that Colt instructed CIOC not to return Plaintiffs to their bargaining unit status when the Midland plant closed on October 31, 1982 so as to avoid the cost of benefits applicable to bargaining unit employees.

To properly discuss the case *sub judice*, we must review the previous litigation between the parties.

On September 3, 1982, Plaintiffs filed a Complaint in the U.S. District Court for the Western District of Pennsylvania against Colt Industries, Inc.; Crucible Inc., now Colt Industries Operating Corporation (CIOC); the United Steelworkers of America, International Union; United Steelworkers of America, Local Union 1212, 3177, 5047; and Mellon Bank, N.A. Jurisdiction was premised on the Labor Management Relations Act (LMRA), 29 U.S.C. § 185; Employee Retirement Income Security Act (ERISA), 29 U.S.C. § 1001 et seq.; and the Federal Declaratory Judgment Act, 28 U.S.C. § 2201.

On November 12, 1982, the United Steelworkers of America and the affiliated local unions filed Motions to Dismiss, or in the alternative, Motions for Summary Judgment. On November 18, 1982, the same Motions were also filed by Colt, CIOC and Mellon Bank.

In his Order dated December 10, 1982, Judge Ziegler granted Plaintiffs leave to file an Amended Complaint, dis-

missed the ERISA claim and granted Defendants' Motion for Summary Judgment on all other counts. Judge Ziegler also certified the class of Plaintiffs consisting of all supervisory and managerial employees of Crucible who had been employed in job classifications included in the collective bargaining units represented by Defendants United Steelworkers of America, Local Unions 1212, 3177 and 5047 and promoted to non-union eligible positions.

On September 21, 1983, the Court of Appeals for the Third Circuit affirmed the judgment without Opinion, 722 F.2d 733 (3d Cir. 1983).

Having reviewed the previous Federal litigation between the parties, we will now continue our discussion and examination of the pleadings filed in the present case.

In response to Plaintiffs' Complaint, on July 26, 1984, Colt and CIOC filed a Petition for Removal based on diversity of citizenship and ancilliary jurisdiction over the State Court Complaint because of the District Court's previous ruling.

On September 19, 1984, Plaintiffs filed a Motion to Remand to this Court. On February 8, 1985, Judge Ziegler granted Plaintiffs' Motion to Remand. *Nobers v. Crucible, Inc.*, 602 F. Supp. 703 (W.D. Pa. 1985). Judge Ziegler noted that he was at a loss to explain the failure of Plaintiffs to include the oral and/or implied contract agreements as pendent claims in the original Federal action. *Nobers* at 708-709.

On March 1, 1987, Defendants filed the present preliminary objections and on October 10, 1985, filed the amendment to preliminary objections.

On March 11, 1985, Colt and CIOC filed an action in the District Court pursuant to the All Writs Act requesting the Court to enjoin the State Court proceeding brought against Colt and CIOC asserting that the pending state claims should have been alleged as pendent claims in the previous Federal action and are now barred by *res judicata*.

On August 12, 1985, the District Court denied the request for injunctive relief and dismissed the Complaint. The Court agreed with Defendants (Plaintiffs in the present

action) that the pending common law contract claims are separate and distinct from the previous claims which were based on the collective bargaining agreement even though they could have been appended to the earlier Federal action. Judge Ziegler noted, that if the pendent state law claim had been asserted after the December 10, 1982 Order, the Court would have dismissed them without prejudice since judgment was entered well in advance of trial.

On March 6, 1986 the Court of Appeals for the Third Circuit affirmed and Defendants' Petition for Rehearing was denied.

It is Defendants' contention that the Complaint fails to state a claim upon which relief can be granted against Defendant Colt because Plaintiffs' Complaint does not allege the existence of an employment contract or employment relationship between Plaintiffs and Colt. Defendants' amendment to preliminary objections argues that the tort allegedly committed by Colt is solely cognizable under § 510 of ERISA, 29 U.S.C § 1140, therefore, it is pre-empted by § 514 of ERISA, 29 U.S.C. § 1144.

Defendants also contend that the allegations in the instant Complaint are virtually identical to the allegations in the previous Federal action and clearly were or could have been litigated therein, therefore, the instant claim is barred by *res judicata*. We do not believe that the doctrine of *res judicata* applies. In his Memorandum Opinion, Judge Ziegler declined to determine whether the Federal rules of *res judicata* should bar the pending state action.

The question of jurisdiction however, is controlling and we will now focus our discussion on that issue. In two recent cases, the United States Supreme Court has examined the pre-emptive force of ERISA § 502(a), 29 U.S.C. § 1132(a)(1)(A),(B) and § 514(b)(2)(A),(B) 29 U.S.C. § 1144(a),(b)(2)(A),(B), *Pilot Life Insurance Co. v. Dedeaux*, 55 U.S.L.W. 4471 (U.S. April 6, 1987), *Metropolitan Life Insurance Co. v Taylor*, 55 U.S.L.W. 4468 (U.S. April 7, 1987).

Both the language and the legislative history of the civil enforcement provisions of ERISA, § 502, 29 U.S.C. § 1132

clearly demonstrate that it is the exclusive vehicle for actions by ERISA plan participants and beneficiaries asserting improper proceeding of a claim for benefits.

The Section provides:

> (a) Persons empowered to bring a civil action. A civil action may be brought —
>
> (1) by a participant or beneficiary —
>
> (A) for the relief provided for in subsection (c) of this section, or
>
> (B) to recover benefits due to him under the terms of his plan, to enforce his rights under the terms of the plan, or to clarify his rights to future benefits under the terms of the plan:
>
> (2) by the Secretary, or by a participant, beneficiary or fiduciary for appropriate relief under Section 1109 of this title; . . .

The Supreme Court in *Pilot Life Insurance Co.*, 55 U.S.L.W. at 4474 examined the enforcement scheme of ERISA § 502 (a) and explained:

> In sum, the detailed provisions of § 502(a) set forth a comprehensive civil enforcement scheme that represents a careful balancing of the need for prompt and fair claims settlement procedures against the public interest in encouraging the formation of employee benefit plans. . .
>
> The deliberate care with which ERISA's civil enforcement remedies were drafted and the balancing of policies embodies in its choice of remedies argue strongly for the conclusion that ERISA's civil enforcement remedies were intended to be exclusive.

Likewise, the legislative history also supports the exclusivity intended for § 502(a). The Conference Report on ERISA which describes the civil enforcement provisions of § 502(a) states:

"Under the conference agreement, civil actions may be brought by a participant or beneficiary to recover benefits due under the plan, to clarify rights to receive future benefits under the plan, and for relief from breach of fiduciary responsibility . . . All such actions in Federal or State courts are to be regarded as arising under the laws of the United States in similar fashion to those brought under section 301 of the Labor-Management Relations Act of 1947." H.R. Conf. Report No. 93-1280, p. 327 (1974) (emphasis added) [sic]." *Pilot Life Insurance Co.* at 4474, *Metropolitan Life Insurance Co.* at 4470.

If a state law relates to an employee benefit plan it is preempted, § 514(a),(b) as set forth in 29 U.S.C. § 1144(a),(b) reads as follows:

(a) Supersedure; effective date.

Except as provided in subsection (b) of this section, the provisions of this subchapter and subchapter III of this chapter shall supersede any and all State laws insofar as they may now or hereafter relate to any employee benefit plan described in section 1003(a) of this title and not exempt under section 1003(b) of this title. This section shall take effect on January 1, 1975.

(b) Construction and application.

(1) This section shall not apply with respect to any cause of action which arose, or any act of omission which occurred before January 1, 1975.

(2) (A) Except as provided in subparagraph (B), nothing in this subchapter shall be construed to exempt or relieve any person from any law of any State which regulates insurance, banking, or securities.

(B) Neither an employee benefit plan described in section 1003(a) of this title, which is not exempt under section 1003(b) of this title (other than a plan established primarily for the purpose of providing death benefits), nor any trust established under such a plan, shall be deemed to be an insurance company or other insurer, bank, trust company, or investment company or to be engaged in the business of insurance or banking for

purposes of any law of any State purporting to regulate insurance companies, insurance contracts, banks, trust companies, or investment companies.

The Supreme Court noted that the express pre-emption provisions of ERISA are deliberately expansive and are designed to "establish pension plan regulation as exclusively a federal concern." *Pilot Life Insurance Co.* at 4472 quoting *Alessi v. Raybestos-Manhattan Inc.*, 451 U.S. 504, 523 (1981).

Construed as an expansive provision, the phrase "relate to any employee benefit plan" must be given its broad common sense meaning so that if a state law has a connection with or reference to such a plan it is pre-empted. *Pilot Life Insurance Co.* at 4472, *Metropolitan Life Insurance Co.* at 4470.

Guided by the above, we examine plaintiffs present Complaint. In paragraph 43 Plaintiffs allege that "the breach of this oral contract of employment has resulted in damages to the named plaintiffs and all other similarly situated supervisors and managers in the form of lost supplemental unemployment benefits. . ." Paragraph 44 states a claim for damages in the form of "lost immediate pension benefits. . ." and paragraph 45 states a claim for "lost pension benefits in the event of a plant closing. . ." Paragraph 46 claims damages for "lost insurance benefits." The same damages are listed under Count I Assumpsit-Express Contract and Count II Assumpsit-Implied Contract.

Because Plaintiffs' claim for damages goes directly to the establishment of a benefit plan, Plaintiffs' claim does "relate to" an employee benefit plan, therefore, it is pre-empted by ERISA and we are, therefore, without jurisdiction to entertain the matters raised.

Although we are personally sympathetic to the issues raised by Plaintiffs', we must nonetheless follow the law as cited above hence we enter the following Order:

COURT OF COMMON PLEAS FOR THE
COUNTY OF BEAVER
PENNSYLVANIA
Civil Division

DAVID A. NOBERS, ROBERT R. CAMPBELL, JR., GASPER P. PORTO and GARY T. WEEKLY, individually and on behalf of themselves and all others similarly situated, *Plaintiffs* v. CRUCIBLE INC., a corporation and COLT INDUSTRIES, INC., a corporation, *Defendants*	No. 843 of 1984

ORDER

WALKO, J. August 7, 1987

AND NOW this 7th day of August, 1987, after careful review and consideration of the legal briefs and oral arguments presented by counsel, it is hereby Ordered, Adjudged and Decreed that the Preliminary Objections filed by Defendants Crucible Inc. and Colt Industries, Inc. are granted as to jurisdiction.

BY THE COURT

/s/ JOSEPH WALKO

J.